

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DONALD WOODWORTH,

Plaintiff,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Canandaigua VA Medical Center, et al.,

Defendants.

REPORT & RECOMMENDATION

09-CV-6076L

On June 11, 2010, defendants filed a motion to dismiss the above-captioned matter without prejudice for insufficient service of process. (Docket # 5). On August 13, 2010, plaintiff moved for an extension of time to effect service. (Docket # 8). United States District Judge David G. Larimer then referred the motions to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b). (Docket ## 10, 14). Oral argument on the motions was held on February 16, 2011. (Docket # 16). On February 18, 2011, plaintiff's counsel filed a supplemental affirmation expressing plaintiff's desire to discontinue the instant action in light of plaintiff's filing of a second action against the same defendants. (Docket # 15 at ¶¶ 7, 29). On June 2, 2011, United States District Judge Michael A. Telesca dismissed plaintiff's second action. (*See* 10-CV-6630, Docket # 8). On September 1, 2011, plaintiff's counsel represented orally to chambers that plaintiff maintained his wish to discontinue the instant action.

Accordingly, I recommend that the district court grant defendants' motion to dismiss the instant action (Docket # 5) and deny plaintiff's motion for an extension of time to effect service (Docket # 8).

s/Marian W. Payson

MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
September 6, 2011

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

ORDERED, that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of this Court within fourteen (14) days after receipt of a copy of this Report and Recommendation in accordance with the above statute, Fed. R. Civ. P. 72(b), 6(a) and 6(e) and Local Rule 72.3(a)(3).

The district court will ordinarily refuse to consider on *de novo* review arguments, case law and/or evidentiary material which could have been, but was not, presented to the magistrate judge in the first instance. *See e.g. Paterson-Leitch Co., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988).

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Decision and Order), may result in the District Court's refusal to consider the objection.**

Let the Clerk send a copy of this Order and a copy of the Report and Recommendation to the attorneys for the Plaintiff and the Defendant.

IT IS SO ORDERED.

s/Marian W. Payson

MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
September 6, 2011